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In the Supreme Court of the United States

OCTOBER TERM, 1961

MICHIGAN GAS AND ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION,
MICHIGAN WISCONSIN PIPE LINE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Federal Power Commission (R. 339-397) is reported at 22 F.P.C. 775. The order of the Commission denying rehearing (R. 428-447) is reported at 22 F.P.C. 1157. The opinion of the Court of Appeals (Pet. App. 1a-5a) is reported at 290 F. 2d 374. The order of the Court of Appeals denying a rehearing en banc (Pet. App. 1c) is unreported.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 1b) was entered on April 20, 1961. A timely petition for rehearing en banc was denied on June 1, 1961 (Pet. App. 1c). The petition for a writ of certiorari was filed on August 30, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U.S.C. 717r (b).

QUESTION PRESENTED

Whether there is a reasonable basis for the finding of the Commission of no undue discrimination in the sale of gas to petitioner.

STATUTE INVOLVED

Section 4 (b) of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 822, 15 U.S.C. 717c (b), provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

STATEMENT

Petitioner, Michigan Gas and Electric Company, distributes manufactured gas in three communities of the Upper Peninsula of Michigan, and has franchises to distribute natural gas in these communities and four other Upper Peninsula communities (R. 151-155). Additionally, in a portion of the Lower Peninsula of Michigan, it distributes natural gas which it purchases from Michigan Wisconsin Pipe Line Company (R. 151-153). Michigan Wisconsin is an interstate pipeline company operating a pipeline system extending from Texas to Michigan. It obtains gas from producers in Texas, Oklahoma, Kansas, and from an affiliated pipeline company which purchases gas in Louisiana, and sells to distributors in Missouri, Iowa, Illinois, Wisconsin, and Michigan.

Michigan Wisconsin and Midwestern Gas Transmission Company, another pipeline company, had organized a major project to import Canadian gas and transport it to Wisconsin. The present proceedings before the Federal Power Commission were begun by Midwestern's application for a certificate of public convenience and necessity authorizing it to construct and operate pipeline facilities for the importation of 204,000 Mcf per day of natural gas from Canada (R. 339).

Michigan Wisconsin, in turn, requested a certificate authorizing expansion of its system, involving the construction of about 376 miles of new pipeline plus related facilities which altogether would cost an estimated $24 million, so that it could purchase this

gas from Midwestern and re-sell it to both new and existing customers (R. 341-342). Included in Michigan Wisconsin's proposal was the construction of a 97-mile pipeline from Marshfield, Wisconsin (the eastern terminus of Midwestern's line), eastward to a point near Appleton, Wisconsin, where it would connect with Michigan Wisconsin's existing system (R. 207, 341). From this new line, Michigan Wisconsin further proposed to construct a 96-mile line northward, at a cost of over $4 million, which would terminate at Menominee, Michigan, in the Upper Peninsula just over the Wisconsin border (R. 207, 342). Michigan Wisconsin intended to sell gas at Menominee to its affiliate, Michigan Consolidated Gas Company, at the uniform ACQ-1 rate, and Consolidated in turn would construct the necessary facilities to distribute the gas to various communities in the Upper Peninsula (R. 342, 371).[1]

Petitioner intervened in the proceedings before the Commission, seeking to have Michigan Wisconsin sell gas to it for distribution in the Upper Peninsula, rather than to Consolidated (R. 370). Petitioner

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[1] Prior to its proposal to sell to Consolidated, there had been negotiations between Michigan Wisconsin and the petitioner concerning the sale of gas to the latter for distribution in the Upper Peninsula. It was testified by an official of Michigan Wisconsin (R. 55-58) that Michigan Wisconsin offered either to construct the facilities from Menominee and sell to the petitioner at the various city gates at a rate of 52¢ per Mcf, or to sell to the petitioner at Menominee at the uniform system rate of 42.3¢ per Mcf with the petitioner building the facilities for city gate delivery. These alternative offers were rejected by the petitioner and negotiations subsequently terminated (R. 57-58; cf. R. 167).

also insisted that the sale of gas to either distributing company (petitioner or Consolidated) at Menominee, rather than at the various city gates in the Upper Peninsula, at the uniform ACQ-1 rate paid by all other customers of Michigan Wisconsin, would discriminate against the distributing company (R. 373, 374).

Petitioner submitted two alternative proposals for the elimination of this alleged discrimination. First, it suggested that, if it were to pay the uniform rate, Michigan Wisconsin should construct over half of the transmission facilities from Menominee to the several communities in the Upper Peninsula and petitioner would construct the remaining facilities (R. 373).[2] In the alternative, petitioner proposed that it would construct all of the facilities north of Menominee but would pay Michigan Wisconsin only 37½¢ per Mcf rather than the standard ACQ-1 rate of 42.3¢ (R. 374).

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[2] This proposal was based on Michigan Wisconsin's so-called "10-cent formula". The Commission described this formula as follows: "Under the 10-cent formula, which has been applied by Michigan Wisconsin to test whether to construct laterals to new markets along its route, the operating costs are computed on the basis of 15 per cent of the estimated cost of constructing the lateral and appurtenant facilities and when thus computed the operating costs shall not exceed 10 cents per Mcf on the basis of the estimated annual firm sales in the third year. Michigan Gas contends that the 10-cent formula is properly applicable to these facilities since its purpose is to make possible laterals that would be infeasible for either party to construct entirely by itself" (R. 373). The Commission rejected petitioner's contention that the "10-cent formula" was applicable, pointing out that "in general this formula is applicable to relatively short laterals" (R. 376).

The Commission granted certificates to Midwestern and Michigan Wisconsin authorizing the importation of the Canadian gas and the construction of the proposed facilities. It also granted petitioner's application that the sale of gas for distribution in the upper Peninsula be to the petitioner rather than to Michigan Consolidated (R. 376).[3] However, the Commission rejected both of the alternative proposals submitted by petitioner for the distribution in the Upper Peninsula, finding that they would impose a burden on Michigan Wisconsin's other customers and involve discrimination against them (R. 374-378). Contrary to the assertions made in this Court (Pet. pp. 2, 10-12, 17-19), the Commission also found that there was no undue discrimination against petitioner in connection with Michigan Wisconsin's proposal to sell gas at Menominee at the uniform ACQ-1 rate, with petitioner constructing the necessary facilities from there to the Upper Peninsula communities (R. 376).

Petitioner sought a rehearing before the Commission, asserting error in the decision authorizing sale to it at Menominee at the standard ACQ-1 rate (R.

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[3] The Commission's grant of the application, however, was conditioned upon the petitioner's securing a ten-year contract covering the sale of gas to the Cleveland Cliffs Iron Company, the largest industrial enterprise in the Upper Peninsula (R. 371, 378). It was found by the Commission that, for natural gas service to the Upper Peninsula to be economically feasible, Cleveland Cliffs would have to be a customer for the gas, as that company itself would consume over half of the gas delivered in the Upper Peninsula (R. 371-372, 378, 436).

397-426). The Commission denied the application for rehearing (R. 428-447), reiterating its finding that there was no undue discrimination against petitioner (R. 435, 440). The Court of Appeals affirmed, holding that the "findings of the Commission are adequately supported by the record" (Pet. App. 1a-5a).

ARGUMENT

The question in this case is not, as petitioner has framed it (Pet. pp. 2, 10-12, 17-19), whether the Commission, after rejecting specific proposals submitted for the elimination of admitted undue discrimination, must then undertake on its own to eliminate such discrimination. Contrary to petitioner's assumption, the Commission expressly found in this case that there was *no* undue discrimination. Moreover, even if petitioner were to attack this ultimate finding, the existence of undue discrimination is peculiarly for the Commission's judgment, and the Commission did not act arbitrarily in making its determination here. Also, it is settled that the Commission may permit somewhat different treatment by pipeline companies of distributors, either by making the distributors pay higher rates or constructing some of the pipeline facilities themselves, where, as here, the geographical locations of the distributors justify such differences. There is therefore no occasion for further review by this Court.

1. Petitioner insists that the issue is whether the Federal Power Commission must on its own motion

devise means to rectify a discriminatory condition in the distribution of natural gas, or need it merely rule on specific proposals submitted by an interested party for the elimination of such discrimination. The presence of this issue would depend upon an affirmative finding of discrimination, or at the very least on an absence of any finding with respect to allegations of undue preference. However, such is not this case.

The Commission expressly found that the sale of gas at the standard ACQ-1 rate to the petitioner at Menominee, rather than at some place farther north in the Upper Peninsula, involved no undue discrimination. It stated (R. 376):

> Thus, providing for purchases by Michigan Gas under the ACQ-1 Rate Schedule and construction by it of the necessary Upper Peninsula facilities does not discriminate against that Company.

The Commission also said (R. 375-376):

> Michigan Consolidated could have rendered the service to the Upper Peninsula on a feasible basis while purchasing from Michigan Wisconsin under the latter's Rate Schedule ACQ-1, without any special concessions from Michigan Wisconsin having adverse effects on the other customers that company serves; and we think that Michigan Gas should reasonably be held to the same requirement.

And, in denying petitioner's application for rehearing, the Commission reaffirmed its conclusion of no undue discrimination, stating that requiring the petitioner to purchase gas at the standard rate at Men-

omince was a "reasonable requirement" (R. 435) and was "fair to all concerned" (R. 440).[4]

2. Furthermore, even if petitioner were to attack the Commission's specific finding of no undue preference, there would be no occasion for review by this Court. Judicial review of an order of the Power Commission under the Natural Gas Act is, of course, limited. *Power Com'n.* v. *Hope Gas Co.*, 320 U.S. 591, 602-603. The present proceeding concerned the issuance of a certificate of public convenience and necessity, and "in determining whether certificates of convenience and necessity shall be granted * * * the Commission has been entrusted with a wide range of discretionary authority." *Federal Power Com'n.* v. *Transcontinental Gas Corp.*, 365 U. S. 1, 7, quoting *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241. See also *Panhandle Eastern Pipe L. Co.* v. *Federal Power Com'n.*, 236 F. 2d 289 (C.A. 3). It is also well established that questions of undue preference and discrimination are matters for the judgment of the Commission. *Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 173 F. 2d 784, 789 (C.A. 6);

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[4] The Commission's action in the Baraboo matter, far from supporting petitioner (Pet. p. 18), precisely accords with the order in this case. Here the Commission refused to order all Michigan Wisconsin customers to make excessive contributions toward service to communities remote from the supply of gas; in the case of Baraboo, the Commission refused to permit Michigan Wisconsin to undertake, at the ultimate expense of the other customers, excessive contributions for such service. *Northern Natural Gas Company and Michigan Wisconsin Pipeline Company*, F.P.C. Opinion No. 345, issued June 28, 1961 (not yet reported).

Michigan Consol. Gas Co. v. *Federal Power Com'n.*, 203 F. 2d 895, 901 (C.A. 3). Cf. *Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U.S. 197, 238; *Board of Trade* v. *United States*, 314 U.S. 534, 546. In the circumstances of this case, it cannot be said that the Commission acted arbitrarily or abused its power in concluding that the petitioner should take delivery at Menominee at the standard rate.

Petitioner's contention that the Commission's order is unduly discriminatory is based on its view that, since other customers of Michigan Wisconsin allegedly have gas delivered at the "city gates" or under the so-called "10-cent" formula (footnote 2, *supra*, p. 5) and pay the uniform ACQ-1 rate, petitioner should also have delivery at the "city gates" or under the formula, and at the same price, regardless of the different circumstances present in its situation. Petitioner goes on to argue that, if it is not given delivery at some point beyond Menominee in the Upper Peninsula, then it should pay less for gas than everyone else.

The answer to these claims of discrimination is found in the Commission's reasons for rejecting petitioner's specific proposals requesting preferred treatment for itself. As to the proposal that Michigan Wisconsin should construct a pipeline from Menominee north, either to the several Upper Peninsula communities or under the "10-cent" formula, the Commission found that this would unfairly burden Michigan Wisconsin's other customers. This is because they would have to pay the costs, in terms of

higher rates, for further expansion of Michigan Wisconsin's system into a new and distant locality, where the economic feasibility of natural gas service was not completely certain (footnote 3, *supra*, p. 6). With respect to extending Michigan Wisconsin's pipeline beyond Menominee,[5] pursuant to the "10-cent" formula, the Commission found that this formula "is applicable to relatively short laterals" and that the "maximum distance Michigan Wisconsin has built under it in the past is a line some 17.5 miles long at a cost of approximately $300,000" (R. 376). These findings are amply supported by the record (see, *e.g.*, R. 44-55, 431-432).

Similarly, with respect to petitioner's alternate proposal that, if it were to take delivery at Menominee, it should pay less than the standard ACQ-1 rate paid by all other customers, the Commission found that this "would be discriminatory to Michigan Wisconsin's existing customers" (R. 377); acceptance of petitioner's proposal that it obtain something more favorable than delivery at Menominee at the standard rate "would result in special concessions to it. Either Michigan Gas would receive the benefit of added, unjustifiable construction of facilities by Michigan Wisconsin, or Michigan Gas would receive a preferential rate not justified on the record" (R. 438-439).

The Commission explicitly pointed up the justification for requiring the petitioner to build the pipeline

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[5] It should be noted that Michigan Wisconsin was itself going to build the 96-mile line to Menominee, as part of an expansion system involving 376 miles of new pipeline and $24 million.

facilities north of Menominee, and pay the uniform rate (R. 377-378):

> Finally, there are certain areas of this country which are situated in unfortunate geographical locations in relation to the availability of natural gas. It is no fault of these areas that they happen to be victims of geography. On the other hand, the existing customers can hardly be required to pay excessive costs just to make certain that the areas which are located a great distance from the source of supply may have the benefits of natural-gas service. The hard realities of such circumstances are that those areas must be willing to pay the costs associated with obtaining natural-gas service or be satisfied with other fuels which may be less desirable but which may be more economical to purchase than natural gas.

In sum, the reasoning of the Commission shows that its finding of no undue discrimination had a rational basis. The Court of Appeals reviewed the record and held that the Commission's decision was not arbitrary or unsupported. There is no need or occasion for further review.

3. Finally, it should be pointed out that Commission orders have been upheld even though they have resulted in different treatment of natural gas distributors (by requiring some to pay higher rates or to construct pipeline facilities themselves) because of differing geographical locations. This Court has indicated that where a pipeline is a single integrated project, and would not have been constructed but for the cities at its farthest extremities, then it is fair

to allocate transmission costs evenly among those along the entire pipeline, whereas if the extensions to farther cities are separate projects, not dependent upon earlier customers nearer the source, it would be fair to make the customers at the new ends pay for the extra costs of the additional mileage. See *Colorado Interstate Co.* v. *Federal Power Commission*, 324 U.S. 581, 590-592. The Commission, in the instant case, found (R. 376-377, 434) that the project for the Upper Peninsula was separate and distinct from the operations of the pipeline company in Wisconsin, justifying the different treatment.[6]

Other cases approving higher charges to distributors farther from the source of the gas include *Interstate Power Co.* v. *Federal Power Commission*, 236 F. 2d 372 (C.A. 8), certiorari denied, 352 U.S. 967 (where it was held that uniform rates throughout the pipeline system were discriminatory and that distributors at a greater distance from the source should pay more), and *Minneapolis Gas Company* v. *Federal Power Commission*, 278 F. 2d 870 (C.A.

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[6] This is the distinction between the present case and *Michigan Wisconsin Pipe Line Co.*, 9 F.P.C. 127, relied on by petitioner. As to the earlier case, the Commission stated (R. 434):

> That case presented the question of whether Michigan Wisconsin should be required to construct relatively short service laterals off its main transmission line to render city-gate deliveries, a wholly different situation from that presented here, involving the extension of transmission facilities into a new market region which, by reason of its peculiar characteristics, lacks the stability of existing markets.

D.C.), certiorari denied, 364 U.S. 891 (upholding an order requiring distributors on certain lines to make contributions to the initial cost of the pipeline). See also the recent discussion of this problem by Mr. Justice Reed in *Battle Creek Gas Company* v. *Federal Power Commission*, 281 F. 2d 42, 45-47 (C.A. D.C.).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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